LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 70

Ref: LCRO 185/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**BC** Applicant
AND	**DE and FG** Respondents

DECISION

The names and identifying details of the parties in this decision have been changed.

Introduction

[1] Ms BC has applied to review a decision made by the [Area] Standards Committee [X] (the Committee) dated 21 August 2020, in which the Committee decided to take no further action on her complaint against Ms DE and Ms FG (the respondents).

[2] The Committee based its decision upon s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Committee to dismiss a complaint if it considers that a complainant has an adequate remedy elsewhere which it would be reasonable for that complainant to pursue.

Background

[3] In March 2020 Ms BC issued proceedings against her former employer RL, an incorporated law firm, in the Employment Relations Authority (the employment proceedings).

[4] Ms FG was one of two directors of RL.

[5] Amongst the allegations made by Ms BC in the employment proceedings, was that RL/Ms FG had committed acts of fraud and other criminal conduct.

[6] Shortly after filing the employment proceedings, Ms BC made an application to have them transferred to the Employment Court.

[7] On 6 May 2020, the member of the Employment Relations Authority (ERA) with the responsibility for managing and hearing the employment proceedings, made various procedural directions following a case management conference between the parties.

[8] Amongst the directions made was that the parties were to attend mediation, with that to be arranged by Mediation Services. The ERA also made directions requiring the parties to provide each other and the ERA, with documents relevant to the employment proceedings and the application to remove those proceedings to the Employment Court.

[9] The directions included the usual provision inviting the parties to refer back to the ERA in the event of difficulty.

[10] On or about 18 May 2020, RL instructed Ms DE to represent it in the employment proceedings.

[11] Difficulties arose in relation to a suitable date for the mediation. As well, Ms BC had concerns about the directions that had been made on 6 May 2020.

[12] In early June 2020 Ms BC wrote to Ms DE complaining that the latter had not provided documents to her as required by the procedural directions. She referred to the Privacy Act 1993, and made an information privacy request for release to her of a large number of documents held by RL.

[13] Ms BC also asked the ERA to intervene in connection with her information privacy request, but was informed that it did not have the jurisdiction to make the release orders sought under the Privacy Act 1993. It invited the parties to make a targeted discovery application.

[14] On 23 June 2020, and responding to the information privacy request, Ms DE provided Ms BC with a considerable number of documents, some of which included redactions (to comply with RL's other obligations under the Privacy Act 1993).

[15] Ms BC was dissatisfied with this, and made a complaint to the Office of the Privacy Commissioner.

The complaint

[16] Ms BC lodged her complaint against the respondents in a letter to the Complaints Service dated 11 June 2020. She said the following:

(a) Ms DE was in breach of her obligations under s 4 of the Act which required her to uphold the rule of law and to facilitate the administration of justice in New Zealand.

(b) Ms FG was obstructing legal proceedings thereby bringing the legal profession into disrepute.

[17] Attached to her complaint was Ms BC's complaint to the Office of the Privacy Commissioner about the respondents' failure to comply with her information privacy request.

[18] Ms BC also provided copies of correspondence that she had exchanged with the respondents and with Mediation Services

Standards Committee processes

[19] Ms BC's complaint was initially assessed as being suitable for the Complaints Service's Early Resolution Process (ERP).

[20] That procedure involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[21] If the Committee's preliminary view is that the complaint appears to lack substance, a Legal Standards Officer (LSO) will contact the respondent lawyer and inform them of the Committee's preliminary view, inviting a response from the lawyer.

[22] Any response is included in a file note, described as a "Call Log", prepared by the LSO and provided to the Committee, which then completes its inquiry into the complaint.

[23] On 17 August 2020 the LSO spoke to Ms DE and informed her of the Committee's preliminary view about Ms BC's complaint.

[24] The Call Log records that Ms DE "wondered what was happening as Ms BC had included information and file numbers but she had yet to [be] asked to respond to any complaint." Further, Ms DE was "happy to provide the Standards Committee with any information it requires." Ms DE also said that she would speak to her client, Ms FG, and convey her views to the LSO.

[25] On 19 August 2020 Ms DE informed the LSO that she "had discussed [the] complaint and [the] Committee's preliminary view [with] Ms FG [who was] willing to provide any information the Standards Committee required to make its decision."

[26] The complaint, including the Call Log, was referred to the Committee for further consideration.

Standards Committee decision

[27] The Committee identified the issue as being whether it was the "appropriate forum to consider Ms BC's complaint."[1] It further noted that a Committee "can decide to take no further action on a complaint where it considers there is an adequate remedy or right of appeal that would be reasonable for the complainant to exercise."[2]

[28] The Committee then observed that the Office of the Privacy Commissioner "was established to provide information on privacy matters and to resolve privacy disputes, for which it has a complaints system to investigate potential breaches of the privacy principles."[3]

[29] Ms BC had, held the Committee, "recognised this in her application to the [Privacy Commissioner] for assistance in gaining the information she seeks." Ms DE had also engaged with that Office.[4]

[30] For that reason, the Committee declined to take further action on Ms BC's complaint, noting that both parties had appropriately engaged under the Privacy Act 1993.

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[1] Standards Committee decision at [8].
[2] At [9].
[3] At [10].
[4] At [11].

Application for review

[31] Ms BC lodged her review application on 30 September 2020. She said:

(a) The Committee's decision was made "on an erroneous position."

(b) Her complaint was that the respondents "were obstructing legal proceedings" and that Ms DE was "in breach of … the obligation to uphold the rule of law and to facilitate the administration of justice."

(c) The respondents were required to disclose documents and information pursuant to a direction made in the employment proceedings, by a certain time, and failed to do so.

(d) The complaint to the Office of the Privacy Commissioner then prompted Ms DE to get instructions from Ms FG about the information.

(e) This was conduct that "was unbecoming of the legal profession and a direct attempt to frustrate legal proceedings [and] should not be condoned."

(f) The respondents have breached their obligations to facilitate the administration of justice and uphold the rule of law.

[32] The outcome that Ms BC seeks includes a finding of unsatisfactory conduct against both respondents. As well, she seeks a direction for the release of "all documents and information requested in relation to the [employment proceedings] in an unredacted and unadulterated form without further delay." Finally, she seeks a refund of "the filing fee" (presumably the fee to lodge her review application).

Responses

Ms DE

[33] In a letter to the Case Manager dated 20 October 2020, Ms DE said:

(a) She takes her fundamental obligations as a lawyer to uphold the rule of law and to facilitate the administration of justice in New Zealand, very seriously.

(b) Having reflected upon Ms BC's complaint and her own conduct, Ms DE said that she had not breached her duty to the ERA, nor had she breached any of the provisions of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

(c) Further, Ms DE did not consider that her conduct was "unbecoming" nor that she had attempted to or otherwise frustrated the employment proceedings or the course of justice.

(d) Throughout, she had been constructive in engaging with the ERA, dealing with the employment proceedings and engaging with Mediation Services.

(e) Ms DE said that she complied with her obligations under the Privacy Act 1993 and that an extension to meet the information privacy request was both necessary and reasonable. She said that this was currently with the Office of the Privacy Commissioner.

Ms FG

[34] Also on 20 October 2020, Ms FG responded to Ms BC's review application in a letter to the Case Manager. She said:

(a) The Committee had correctly identified the issue as being one more properly to be dealt with by the Office of the Privacy Commissioner, as this was the forum that Ms BC had chosen.

(b) In any event, Ms BC's review application widens her original grounds of complaint, with no proper basis for doing so and without any explanation.

(c) Ms FG said that she had not obstructed the process of the employment proceedings, nor had she breached her fundamental obligations as a lawyer or otherwise breached any provisions of the Rules.

[35] Finally, Ms FG notes that once Ms DE was instructed to act for RL in the employment proceedings, on 18 May 2020, she [Ms FG] "was not providing regulated services or acting in the course of [her] legal practice", but nevertheless her conduct was otherwise proper and appropriate. She submitted that in those circumstances it is "not open to [a Review Officer] to make a finding of unsatisfactory conduct [against her]."

Comment by Ms BC

[36] In an email to the Case Manager dated 27 October 2020, Ms BC provided her response to the respondents' submissions. She asked for a direction that:

> [T]his matter be referred to [XX] Standards Committee [X] as that Committee is fully aware of the situation and the issues involved in this matter as a result of a substantial and ongoing complaint (which was filed in February [2020]) that is before them which has not yet been determined. [The [Area]Standards Committee [X]] that dealt with the matter that is currently [the subject of this review application] are not privy to the information that [XX] Standards Committee [X]have in their possession."

[37] Ms BC also suggested that the respondents' responses "appear to give rise to other breaches of the Rules."

Nature and scope of review

[38] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[5]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[39] More recently, the High Court has described a review by this Office in the following way:[6]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

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[5] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[6] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[40] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Hearing on the papers

[41] Section 206(2) of the Act allows a Review Officer to deal with a review application on the papers, if she or he considers that it can be adequately determined in that way on the basis of the available information.

[42] Before adopting that approach, a Review Officer "must give the parties a reasonable opportunity to comment on whether the review should be dealt with in that manner."[7]

[43] With that in mind and at my direction, on 30 October 2020 the Case Manager wrote to the parties and indicated that my initial appraisal of Ms BC's review application was that it might appropriately be dealt with on the papers. Submissions about that preliminary indication were invited from the parties.

[44] In an email to the Case Manager dated 13 November 2020 Ms BC referred to the submissions that she had made in her email to the Case Manager dated 27 October 2020, inviting me to refer the matter back to the [XX] Standards Committee [X]. Ms BC said that if that course was being considered by me, then she consented to her review application being dealt with on the papers.

[45] In the alternative, she submitted that if my preliminary view was to deal with the substantive merits of her review application, then she "challenged the assertion that [I am] in the position to have made the assessment [that the matter could be dealt with on the papers and on the basis of the information available]."

[46] Neither respondent made any submissions about the format of the hearing.

[7] Section 206(2A) of the Act.

[47] I directed the matter to proceed as an applicant-only hearing, but invited the respondents to attend if they wished. Both indicated that they did not wish to attend the hearing.

[48] The matter was thus scheduled to proceed before me on 30 April 2021, as an applicant-only hearing, and the parties sent a Notice of Hearing to this effect.

[49] Ms BC did not attend at the scheduled time of 9.30am. I directed the Case Manager to telephone her and enquire when she would be appearing. Ms BC informed the Case Manager that she was unwell and would not be attending the hearing.

[50] Having earlier come to the preliminary view that Ms BC's review application could adequately be dealt with on the papers on the basis of the available information, I reconsidered the position and issued a Minute to the parties on 30 April 2021 confirming that I would now be dealing with the review application, on the papers.

[51] I attach a copy of that Minute to this decision, as it deals with other procedural matters that had been raised by Ms BC.[8]

[52] I confirm that I have read Ms BC's complaint and the Committee's decision. I have also read the review application, the respondents' responses to that and Ms BC's comments about those responses.

[53] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from any of the parties.

Discussion

Referral to another Standards Committee

[54] There is jurisdiction for a Review Officer to refer the whole or any part of a complaint to "a Standards Committee to reconsider and determine, either generally or in respect of any specified matters."[9]

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[8] One of the procedural matters referred to in that Minute was an application that I disqualify myself from completing this review, on the basis I was a lawyer member of [Area] Standards Committee [6] in 2012, which dealt with a complaint that Ms BC made against another practitioner. In responding to this Minute, Ms BC said that the Standards Committee decision/determination from 2012 was not signed by me as the Convener of that Committee. She said that she had only become aware that I had been a Convenor of that Committee, recently. Naturally I accept what Ms BC has said about that. This does not alter my earlier decision not to disqualify myself from dealing with this review application.

[9] See generally s 209 of the Act.

[55] That would appear to include the power to direct a differently constituted Standards Committee to reconsider a complaint. An example of this might be where a Standards Committee had exhibited bias in its decision-making. Self-evidently, a complaint in those circumstances must be considered by a fresh Standards Committee free from the taint of bias.

[56] There must always be a proper basis for exercising the power to direct a Standards Committee to reconsider a complaint. In my view, that basis must be anchored in some procedural or substantive error on the part of the Standards Committee, justifying a reconsideration of the complaint.

[57] Ms BC has submitted that because the [XX] Standards Committee [X] is (or was at 27 October 2020) "fully aware of the situation and the issues involved in this matter as a result of a substantial and ongoing complaint … that is before them" and that the [Area] Standards Committee [X] was unaware of those other issues, the current complaint can be folded into the matter before the [XX] Standards Committee [X].

[58] Ms BC provides no evidence about the "substantial and ongoing complaint" then before the [XX] Standards Committee [X]. Presumably it related to conduct by the respondents in connection with the employment proceedings.

[59] That is not a sufficient basis for me to exercise the power of referral back and reconsideration.

[60] Moreover, I am satisfied that the issues arising in the current complaint are narrow and discrete, and are easily able to be considered by me by the application of well understood principles.

[61] I therefore decline to refer this matter back to a differently constituted Standards Committee for it to consider in conjunction with some other matter involving the respondents.

Scope of this review

[62] The Committee dealt with Ms BC's complaint about the respondents' conduct as being related to the complaint that she had made to the Office of the Privacy Commissioner. That complaint concerned the respondents' failure, according to Ms BC, to properly deal with her information privacy request.

[63] In her review application, Ms BC said that her complaint was that the respondents "were obstructing legal proceedings" and that Ms DE was "in breach of … the obligation to uphold the rule of law and to facilitate the administration of justice."

[64] She also said that the respondents were required to disclose documents and information pursuant to a direction made in the employment proceedings, by a certain time, and failed to do so.

[65] In responding to Ms BC's review application, Ms FG submitted that it was wider than her original complaint. Ms FG did not specifically identify where she considers Ms BC to have broadened her complaint.

[66] It is trite to observe that the process of reviewing a Standards Committee decision or determination does not involve a Review Officer considering fresh issues of complaint that were not before the Committee. The use of the word "review" to describe the process makes this clear.

[67] The process of review by a Review Officer involves an examination of material that was before a Standards Committee and an independent assessment of that material to determine whether there has been some ethical or professional breach by a lawyer which justifies disciplinary intervention.

[68] I am not persuaded that Ms BC's review application introduces fresh issues of complaint that were not before the Committee.

[69] I accept that Ms BC was more explicit in her review application about the discovery directions that had been made in the ERA, than she had been in her complaint.

[70] But both her complaint and review application refer to alleged breaches by the respondents of, in the case of Ms DE, fundamental obligations to uphold the rule of law, and in the case of Ms FG that she was obstructing legal proceedings (being the employment proceedings).

[71] As well, in correspondence attached to her complaint, Ms BC included an email she had sent Mediation Services in which she referred to the ERA's direction "that [Ms] FG … cooperate with me and provide all relevant documents and information in this matter upon my request."[10]

[72] Further, Ms BC provided a copy of an email that she had sent to the ERA on 8 June 2020 in which she said:

> I note that [RL] have actively refused to comply with the request for documents and information. They have neither complied with the time-scape of [the ERA's] direction (which they have not challenged) nor the timeframes prescribed under the Privacy Act.

[10] I observe that, despite that comment by Ms BC, she nevertheless challenged "the validity of [the ERA's] direction" in her correspondence with Mediation Services.

[73] In an email to the ERA dated 28 June 2020 (also part of her complaint material), Ms BC said:

> [RL] have failed to provide documents and information that are relevant to [the employment proceedings].

[74] I am satisfied that the totality of Ms BC's complaint material sufficiently raised the issue of whether there were disciplinary issues for which the respondents were answerable, in the employment proceedings.

[75] The question then becomes whether, because the Standards Committee focused attention only on that part of Ms BC's complaint relating to the information privacy request, I should return the issue she raised about the employment proceedings to the Committee for it to consider afresh.

[76] Generally there is merit in this approach, because it provides for a first-instance inquiry, dissatisfaction at the outcome of which gives rise to the relatively benign review rights to a Review Officer.

[77] However, I note that in its decision, the Committee said the following:[11]

> In reaching its decision, the Committee had before it and considered all material presented by Ms BC. The Committee notes that some complaints raised by Ms BC were ancillary to the main issues identified in the complaint and none of those ancillary matters raise professional conduct issues.

[78] I have no doubt that the Committee was cognisant of Ms BC's complaint about the respondents' conduct in the employment proceedings, but nevertheless it concluded that she was principally concerned about the respondents' treatment of her information privacy request.

[79] I accept that the Committee turned its mind to the related employment proceedings issues that Ms BC had, perhaps obliquely, referred to in her complaint but concluded that further inquiry was not necessary.

[80] For that reason, I do not consider it necessary for me to return that part of Ms BC's complaint relating to the employment proceedings, to the Committee.

[81] For the purposes of Ms BC's review application, I will deal with each of the issues of complaint, separately.

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[11] Standards Committee decision at [15].

Analysis:

The employment proceedings

[82] It is fundamental to the orderly administration of justice that where a party (or a lawyer acting for a party) fails to comply with an order or direction made by the presiding decision maker, then that decision maker considers the breach (in the context of the proceedings), and makes a decision about any consequences for the parties.

[83] Dissatisfaction with a decision maker's response to breaches of their procedural orders is generally able to be pursued in the conventional way of rehearing, review or appeal.

[84] It is inappropriate for another decision-maker from a different jurisdiction to weigh in on an alleged breach and, for example, direct compliance with a procedural order made by another decision-maker.

[85] For that reason alone, whatever view I come to about Ms BC's complaint, it would be quite wrong of me to direct the respondents to comply with a procedural order made during the employment proceedings.

[86] It is sometimes the case that a particular issue may have consequences in different jurisdictions. The discovery issue in the employment proceedings is a good example of this.

[87] As well as seeking orders for discovery from the ERA, Ms BC also has co-existing rights under the Privacy Act 1993 to make a request for the release of any personal information about her that either respondent might hold, from the respondents.[12]

[88] However, pursuing a complaint under the Privacy Act 1993 that an information privacy request has not been complied with, is not an alternative to an application for discovery in proceedings. Each procedure has a different reach, and a different consequence. For example, although a party might fully comply with a discovery order that has been made, there may be additional information not covered by the discovery

[12] The Privacy Act 1993 was substantially amended and reprinted on 1 December 2020, the date on which it came into force. It is now referred to as the Privacy Act 2020. However, Ms BC's employment proceedings were commenced before that date and her request to the respondents for release of personal information about her and subsequent complaint about that to the Office of the Privacy Commissioner, also occurred before that date. Hence, the provisions of the Privacy Act 1993 govern the Privacy Commissioner's approach to Ms BC's complaint. The relevant Information Privacy Principle is IPP 6.

order but which would nevertheless be covered by the release provisions of the Privacy Act.

[89] Further, a breach by a party in complying with a discovery order would not necessarily engage release issues under the Privacy Act.

[90] Thus, the two processes (discovery in proceedings and release under the Privacy Act) serve different purposes and the latter does not subvert or in any other way compromise the former. Each has a separate and distinct function.

[91] Similarly, a lawyer who breaches a procedural order made by a court or tribunal, may, as well as facing sanction in that forum, also find themselves the subject of disciplinary inquiry.

[92] However, before a Standards Committee could properly make a finding that the lawyer has breached some ethical or professional obligation in connection with the breach of the procedural order, the court or tribunal must first have made its own finding as to whether there had been a breach.

[93] Furthermore, not every breach by a lawyer of a procedural order will automatically lead to a separate disciplinary inquiry. That would depend entirely upon the nature of the breach and how seriously it was viewed by the decision-maker who had made the procedural order.

[94] The ERA, as with most decision making jurisdictions, has the ability to regulate and control its own proceedings and procedures,[13] and this will almost certainly include the power to impose a sanction on a party who defaults in complying with a properly made procedural order. The ERA's response to that breach would inform any subsequent disciplinary inquiry.

[95] It would usurp the powers and the jurisdiction of a decision-maker for the disciplinary process to pre-emptively make a finding about a lawyer's breach of a procedural order made in that jurisdiction.

[96] Quite apart from anything else, the principle of judicial comity applies. This means that the original decision-maker must be left to determine first, whether there has been a breach of a procedural order; secondly, the seriousness of that breach; and thirdly, the consequences.

[97] The rationale for this is tolerably clear.

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[13] Section 160 of the Employment Relations Act 2000.

[98] Decision makers are in the best possible position to assess the effects of any breach of their procedural orders on the proceedings that they are controlling. Not all breaches will be serious, even fewer will be deliberate. Every set of proceedings will have its own particular dynamic which will inform the decision-maker as to the seriousness and consequences of any procedural breaches.

[99] Unless and until the ERA or the Employment Court deals with Ms BC's discovery issues, as articulated by her in her complaint and review application, then there is no room for the lawyers' disciplinary process to be involved.

Complaint under the Privacy Act 1993

[100] The same basic principle of allowing a decision-maker to assess whether there has been some breach of their procedures before the lawyers' disciplinary machinery is triggered, applies to a complaint to the Office of the Privacy Commissioner.

[101] If, after investigation of a complaint that a lawyer has interfered with another person's privacy, the Privacy Commissioner forms the opinion that there has been an interference with privacy, it is open to the Commissioner to refer the matter to the Director of Human Rights Proceedings (Director), under the Human Rights Act 1993.[14]

[102] It then becomes a matter for the Director to decide whether to bring proceedings against the offending lawyer in the Human Rights Review Tribunal.[15] If those proceedings result in the Tribunal declaring an interference with privacy and doing so in terms that were highly critical of the lawyer, then this too could lead to disciplinary inquiry under the Act.

[103] There was nothing before the Committee which remotely indicated criticism of either respondent by the ERA, or by the Privacy Commissioner. It would be wrong for the lawyers' disciplinary process to insert its own judgement about the respondents' conduct, in those circumstances.

Decision

[104] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

[14] Section 77(2) of the Privacy Act 1993.
[15] Section 77(3) of the Privacy Act 1993.

Anonymised publication

[105] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 20th day of May 2021

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R Hesketh
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms BC as the Applicant
Ms DE as a Respondent
Ms FG as a Respondent
Mr HJ as a related person
Mr KL as a related person
[Area] Standards Committee [X]
New Zealand Law Society

LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

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BETWEEN	**BC** Applicant
AND	**DE and FG** Respondents

MINUTE

The names and identifying details of the parties in this MINUTE have been changed.

Introduction

[1] Ms BC has applied to review a decision made by the [Area] Standards Committee [X] (the Committee) dated 21 August 2020, in which the Committee decided to take no further action on her complaint against the respondents.

Procedural background

[2] This review application was set down to proceed as an applicant-only hearing before me, beginning at 9:30 am today. That fixture had been arranged, and the parties notified of it, on 3 March 2021.

[3] Yesterday afternoon Ms BC sent an email to the Case Manager, effectively seeking an adjournment of this morning's hearing on the grounds that she had existing unresolved complaints before a Standards Committee, the outcomes of which would be directly relevant to this review application.

[4] Through the Case Manager I informed Ms BC that her adjournment application was declined. I indicated that Standards Committee decisions/determinations and decisions of Review Officers are presumptively confidential, and without specific direction from the relevant decision-maker, were not admissible in any other proceedings.

[5] Ms BC responded to that in a further email, insisting that this morning's hearing could not proceed. She also raised, for the first time, a claim that I could not deal with this review application because of a conflict of interest. She did not identify the conflict.

[6] Again through the Case manager, I informed Ms BC that the hearing would proceed as scheduled.

[7] Overnight, Ms BC forwarded the Case Manager a large number of emails and several attachments.

[8] In one of her emails Ms BC expanded upon what is effectively an application that I disqualify myself, by providing background. I deal with that further below.

[9] Across several emails Ms BC attached a number of documents which she said were relevant to the review application. I deal with those matters further below.

[10] Ms BC also repeated her submission that as yet unresolved complaints currently being considered by one or more Standards Committee, have a direct bearing on this review application. I deal with that submission further below.

[11] Finally, this morning the Case Manager telephoned Ms BC to enquire when she would be attending today's hearing. She informed him that she could not do so because she was unwell. I deal with that issue, further below.

Application that I disqualify myself

[12] Ms BC has referred to a decision of the [Area] Standards Committee [X], of which I was a lawyer member between 2008 and 2016, in which the Committee took no further action on a complaint that she had made against another practitioner (the 2012 complaint).

[13] The Committee's decision/determination was issued in 2012. I have not seen a copy of that decision/determination since then. It appears to be the case that I was a member of the Committee which considered the 2012 complaint.

[14] I presume that Ms BC received the Committee's decision/determination. If it was signed by me as the Convenor of that Committee, then she has had notice of my involvement in that matter since then yet has only raised this issue at the eleventh hour, late in the afternoon of the day before the scheduled hearing.

[15] Ms BC applied to review that decision/determination, also in 2012, and a Review Officer considered it and issued a decision during 2015, confirming the Committee's decision.

[16] In essence, Ms BC's application that I disqualify myself from dealing with this review application, is founded on a claim of bias or predetermination.

[17] Responding to that, I can indicate that I have no independent recollection of Ms BC's 2012 complaint, nor of the Committee meeting at which it was discussed and a decision made, nor of the decision itself.

[18] To put that in context, [Area] Standards Committee [X] met monthly, for 11 months of the year. On average, the Committee would have made as many as five decisions or determinations at each meeting. Extrapolating, that represents, whilst I was a member of that Committee, in excess of 500 decisions/determinations.

[19] As indicated, I have no recollection of Ms BC's 2012 complaint, or of the outcome.

[20] The Review Officer's 2015 decision was notified to [Area] Standards Committee [X], as is required pursuant to s 213 of the Lawyers and Conveyancers Act 2006 (the Act). I have no recollection of ever reading the Review Officer's decision before today.

[21] Further, I observe that the Review Officer's decision in connection with the 2012 complaint, was issued by her in August 2015. I did not begin with the Legal Complaints Review Office until approximately September 2016.

[22] On the basis of the above, it could not be said that an interested observer, in possession of those facts, would reasonably conclude that I was biased either for or against Ms BC, or had otherwise in some way predetermined the review application.

[23] Moreover, the fact that a decision-maker has dealt with a matter in the past, and one of those parties subsequently appears in a different matter, does not of itself raise the spectre of bias or predetermination on the part of the decision-maker. It is a not infrequent occurrence across all jurisdictions in New Zealand.

[24] Accordingly, I decline to disqualify myself from dealing with this review application.

Outstanding complaints and fresh material

[25] I emphasise that a review application is precisely that: a review of material that was before a Standards Committee, and a consideration of the way in which the Committee dealt with that material and its decision/determination about the complaint. The word "review" makes that tolerably clear.

[26] A review application is not an opportunity for a party to raise a fresh complaint, nor is it an opportunity for a party to lodge fresh evidence or material.

[27] Further, outcomes of different complaints involving the same parties, are not relevant to the process of reviewing a specific Committee decision/determination.

[28] I therefore decline to accept and consider the material that Ms BC sent by email to the Case Manager overnight, except to the extent that some of that material is a duplication of what is already on the Standards Committee or the review file.

[29] Further, I cannot accept as part of the record of this review application, the outcomes of complaints in other matters involving Ms BC and the respondents.

[30] This review application will proceed on the basis of the material that was before the Standards Committee, together with the material submitted by Ms BC when she lodged her review application, and the respondents' responses.

Non-attendance at this morning's hearing

[31] Given my two directions yesterday to Ms BC that this morning's hearing would proceed as scheduled, the hearing room was set up for that purpose, and the Case Manager was present there from approximately 9:20 am to await Ms BC's arrival.

[32] By approximately 9:35 am Ms BC had not arrived, and nor had she advised the Case Manager that she would not be.

[33] I directed the Case Manager to telephone Ms BC and enquire as to when she would appear. She informed the Case Manager that she was sick and would not be attending.

[34] To the extent that this represents a further ground advanced by Ms BC for adjourning this morning's hearing, I do not regard it as compelling. The information was conveyed following a call to Ms BC by the Case Manager, rather than some earlier

message to that effect from Ms BC. Moreover, no medical certificate, as one might expect, has been provided.

Moving forward

[35] When responding to Ms BC's adjournment applications yesterday, and in declining them, I indicated that if Ms BC did not attend this morning's hearing then I would consider exercising my power under s 206(2) of the Act and deal with this review application on the papers, without Ms BC's consent.

[36] I have concluded that this review application can be adequately determined on the papers, and on the basis of the information that is available to me (being the information described by me above at [30]).

[37] The complaint material is extensive, as is Ms BC's review application and supporting documentation. The respondents have each provided comprehensive responses to the review application.

[38] I note that this preliminary indication was given to the parties by the Case Manager on 30 October 2020. Ms BC indicated her view that the matter was "not suitable to be dealt with on the papers". In deference to Ms BC, I directed an applicant-only hearing.

[39] However, having reconsidered the material that is before me I remain of the view expressed in the Case Manager's letter to the parties on 30 October 2020, that this matter may appropriately be dealt with on the papers.

[40] Accordingly, I will proceed on that basis and I anticipate that my decision will be issued to the parties before the middle of May 2021.

[41] I direct that none of the parties is to make any further submissions or provide any further material in connection with this review application.

DATED this 30th day of April 2021

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R Hesketh
Legal Complaints Review Officer